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The Health Care Cases and the New Meaning of Commandeering

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THE *HEALTH CARE* CASES AND THE NEW MEANING OF COMMANDEERING

Bradley W. Joondeph

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THE HEALTH CARE CASES AND THE NEW MEANING OF COMMANDEERING

*Bradley W. Joondeph**

The Supreme Court's decision in the Health Care Cases to sustain the central provisions of the Affordable Care Act (or ACA) was hugely important in several ways. Most commentators have focused on the Court's upholding of the ACA's minimum coverage provision. But the Court's Medicaid holding—that the ACA coerced (and thus commandeered) the states by making their preexisting Medicaid funds contingent on the states' expanding their programs—may actually be more significant as a matter of constitutional law.

The basic thesis of this article is that, in finding the ACA's Medicaid expansion provisions coercive, the Court has re-conceptualized what constitutes a federal "command" to the states, and thus re-defined the scope of the anti-commandeering principle. The Court's holding means that federal laws can constitute commands even when they do not legally compel the states to act. The relevant inquiry is now practical rather than formal: has Congress left the states with a "real option" of saying no to the federal government's conditions? This is an important shift. Not only does it potentially jeopardize a range of federal spending programs, but it also affects laws operating on the states as "conditional prohibitions"—federal statutes conditionally preempting state law. Until now, such statutes have been considered fully consistent with the anti-commandeering doctrine because they do not formally require the states to act. But the Health Care Cases upend this understanding. If, as a practical matter, the states have no "genuine choice" but to govern on a particular subject, Congress's conditions specifying how that subject must be governed (to avoid federal preemption) may well amount unconstitutional commandeering.

This new understanding could be particularly troubling in the field of state and local taxation. The number, complexity, and heterogeneity of state and local tax systems almost certainly impose a number of unnecessary costs on the American economy. And as the Court itself has long recognized, Congress is much better suited institutionally than the judiciary to address these problems. An anti-commandeering doctrine that disempowers Congress from enacting laws that meaningfully regulate state taxation would be unfortunate.

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INTRODUCTION

The Supreme Court's decision in *National Federation of Independent Business v. Sebelius*¹ (better known as the *Health Care Cases*) is easily the most important the Court has handed down since John Roberts became Chief Justice in 2005, and it may prove one of the most significant in the Court's history. In upholding the central provisions of the Patient Protection and Affordable Care Act (or ACA), the Court effectively ratified the most important federal statute in two generations.² If fully implemented, the ACA could fundamentally transform the delivery and financing of health care in the United States, a sector comprising nearly one-fifth of the American economy.³ Further, assuming the Act goes into effect, it will make access to health coverage for all Americans—regardless of income, health, or job status—a permanent component of our basic social contract.⁴ As such,

¹ 132 S. Ct. 2566 (2012).

² See Jack Balkin, *The Court Affirms Our Social Contract*, THE ATLANTIC, June 29, 2012, available at <http://www.theatlantic.com/national/archive/2012/06/the-court-affirms-our-social-contract/259186/> (“The Patient Protection and Affordable Care Act of 2010 made the most significant change to the American social contract since the Great Society programs of the 1960s.”).

³ See, e.g., David Gamage, *How the Affordable Care Act Will Create Perverse Incentives Harming Low and Moderate Income Workers*, TAX L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=2067138> (the ACA “is the most extensive reform to the American healthcare system since the creation of Medicare and Medicaid in 1965”); *The Future of Nursing: Leading Change, Advancing Health Recommendations from the IOM/RWJF Initiative on the Future of Nursing*, available at <http://www.cinhc.org/wordpress/wp-content/uploads/2011/02/IOM-reportsummary.pdf> (“The ACA represents the broadest changes to the health care system since the 1965 creation of the Medicare and Medicaid programs and is expected to provide insurance coverage for an additional 32 million previously uninsured Americans.”).

⁴ See Ronald Dworkin, *A Bigger Victory Than We Knew*, N.Y. REV. BOOKS, Aug. 16, 2012, available at <http://www.nybooks.com/articles/archives/2012/aug/16/bigger-victory-we-knew/>; Joey Fishkin, *A Massive Victory for Liberalism*, BALKINIZATION, June

the ACA may soon become a fixed stone in our constitutional foundation—something akin to Social Security, Medicare, or the Civil Rights Act of 1964—with which all viable political movements (and constitutional theories) will need to come to terms.⁵

Most commentary has focused on that part of the decision sustaining the ACA's minimum coverage provision (or "individual mandate") as a valid exercise of Congress's taxing power.⁶ But there was another important question presented, one that may actually have been more significant as a matter of constitutional law: whether the ACA's substantial expansion of the Medicaid program was within Congress's spending power. Medicaid is the joint federal-state spending program that provides health insurance to the indigent and the disabled. A state's participation in the program is voluntary, but once a state opts in, it must adhere to various federal statutory and

29, 2012, available at <http://balkin.blogspot.com/2012/06/massive-victory-for-liberalism.html>.

⁵ Balkin, *supra* note 2; Fishkin, *supra* note 4; Barry Friedman, *Obamacare and the Court: Handing Health Policy Back to the People*, FOREIGN AFFAIRS, July 16, 2012, available at <http://www.foreignaffairs.com/articles/137779/barry-friedman/obamacare-and-the-court?page=show> (noting that if "Obama wins a second term, then the health-care law will likely abecome entrenched alongside long-standing social welfare programs such as Social Security and Medicare"). Cf. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2008) (describing the phenomenon by which certain "landmark statutes" become quasi-constitutional in nature, in that they shape interpretations of the Constitution as much as the text itself).

⁶ See, e.g., Balkin, *supra* note 2; Fishkin, *supra* note 4; Richard A. Epstein, *Taxation and regulation under the health care act*, SCOTUSBLOG (Jun. 28, 2012, 12:05 PM), <http://www.scotusblog.com/2012/06/taxation-and-regulation-under-the-health-care-act/>; Abigail R. Moncrieff, *Understanding the Failure of Health-Care Exceptionalism in the Supreme Court's Obamacare Decision*, Boston Univ. School of Law Pub. Research Paper No. 12-37, available at <http://ssrn.com/abstract=2109396>; Ilya Shapiro, *We won everything but the case*, SCOTUSBLOG (Jun. 29, 2012, 9:38 AM), <http://www.scotusblog.com/2012/06/we-won-everything-but-the-case/>; Robin West, *Justice Roberts' America*, Georgetown Pub. Res. Paper No. 12-112, available at <http://ssrn.com/abstract=2120523>.

administrative regulations.⁷ The ACA adds to these regulations—most notably, by requiring states, beginning in 2014, to extend coverage to all adults under the age of 65 with incomes up to 133 percent of the federal poverty level.⁸ The federal government will fund most of this coverage expansion, but not all of it.⁹ Thus, the ACA increases the minimum cost to a participating state, and by a considerable amount.

The twenty-six state plaintiffs claimed that, by making the states' preexisting Medicaid funding contingent on their willingness to expand their Medicaid programs, the ACA's conditions are coercive, and hence a "commandeering"—an unconstitutional command to the states to govern according to Congress's direction.¹⁰ In the *Health Care Cases*, seven justices agreed.¹¹ Chief Justice Roberts's controlling opinion explained that, to be sure, Congress could require the states to adhere to the ACA's conditions in order to qualify for the ACA's *new* funding for Medicaid expansion.¹² But Congress could not require the states to participate in the ACA's "new program" on pain of losing their funding for the *existing*, pre-ACA Medicaid program—a program the justices characterized as separate and distinct. Threatening states with the loss of their existing Medicaid funding streams—funds constituting, on average, more than 10 percent of a state's annual budget—"is much more than 'relatively mild encouragement'—it is a gun to the head."¹³ Because the Act offered

⁷ See 42 U.S.C. § 1396c; *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990); *Harris v. McRae*, 448 U.S. 297, 301 (1980).

⁸ See Patient Protection and Affordable Care Act §2001(a)(1); Health Care and Education Reconciliation Act §1004.

⁹ See Health Care and Education Reconciliation Act §1201.

¹⁰ Brief of State Petitioners on Medicaid at 24–53 *Florida v. U.S. Dept. of Health & Human Servs.*, No. 11–400 (S. Ct. Jan. 10, 2012).

¹¹ *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2601–08 (2012) (opinion of Roberts, C.J.); *id.* at 2656–68 (joint opinion of Justices Scalia, Kennedy, Thomas, and Alito).

¹² *Id.* at 2607 ("Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use.")

¹³ *Id.* at 2604 (quoting *South Dakota v. Dole*, 483 U.S. 203, 212 (1987)).

the states no “genuine choice” or “real option” other than to implement the ACA’s Medicaid expansion, reasoned the Chief Justice, it “require[d] the States to govern according to Congress’ instructions,”¹⁴ violating the structural principles of federalism.

The basic thesis of this article is that, in finding the ACA’s Medicaid expansion provisions coercive, the Court has re-conceptualized what constitutes a federal *command* to the states, and consequently re-defined the scope of the anti-commandeering principle. Previously, the Court had invalidated federal statutes as commandeering only when those statutes formally compelled the states to govern in a particular fashion.¹⁵ But the underlying rationale of the *Health Care Cases* is that federal laws can constitute commands even when they do not legally require the states to act. The relevant inquiry is now *practical* rather than formal. What matters is whether Congress has left the states with a “real option” of saying no to the federal government’s conditions.

This is an important shift. As many commentators have recognized, it potentially jeopardizes a range of federal spending programs.¹⁶ If the relevant federal enticements leave the states with no practical choice but to conform to Congress’s instructions—as in the case of the ACA’s Medicaid provisions—the conditions attached to that largesse must now be seen as commands. But the implications go much further. This new meaning of commandeering also affects federal laws operating on the states as “conditional prohibitions,” statutes that conditionally preempt state law. Such statutes are quite common in the United States Code,¹⁷ and they offer the states a choice

¹⁴ *Id.* at 2602 (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)).

¹⁵ See *Printz v. United States*, 521 U.S. 898 (1997); *New York*, 505 U.S. 144.

¹⁶ See, e.g., Jonathan Adler & Nathaniel Stewart, *Positive Steps, Silver Linings*, NATIONAL REV., July 30, 2012, available at <http://www.nationalreview.com/articles/309154/positive-steps-silver-linings-jonathan-h-adler> (“Given how often Congress seeks to use the spending power, the Court’s decision may open a new front in the war to reinvigorate constitutional federalism, and occasion a reexamination of statutes from No Child Left Behind to the Clean Air Act.”).

¹⁷ They include, for example, such prominent laws as the Clean Water Act, 86 Stat. 816, as amended, 33 U.S.C. §1251 et seq.; the Occupational Safety and

of either governing according to a specific set of federal instructions or having their laws on the subject preempted.

Until now, federal statutes conditionally preempting state law have been considered fully consistent with the anti-commandeering doctrine, as they do not legally *compel* the states to act.¹⁸ States that dislike the federal government’s specified terms can simply step aside and do nothing, allowing the federal government to regulate the subject itself. The *Health Care Cases* upend this understanding. The fact that a federal statute offers the states the formal option of stepping aside is no longer sufficient to immunize that statute from a commandeering challenge. If, as a practical matter, states have no real choice but to govern on that subject, then Congress’s conditions amount to commands, and thus violate the anti-commandeering doctrine.

How much might this matter? At this point it is unclear. Much depends on how the Court defines the concept of “genuine choice,” a point left quite vague by the *Health Care Cases*. But regardless how this standard is fleshed out, one place this new understanding could have an immediate impact is in the field of state and local taxation.

States and their political subdivisions impose all sorts of taxes that affect interstate commerce, and the Supreme Court has long held that the Commerce Clause grants Congress the authority to regulate how these taxes are imposed.¹⁹ Like other federal statutes that do not formally require the states to act, these statutes have always been

Health Act of 1970, 84 Stat. 1590, 29 U.S.C. §651 et seq.; and the Resource Conservation and Recovery Act of 1976, 90 Stat. 2796, as amended, 42 U.S.C. §6901 et seq. See *New York v. United States*, 505 U.S. 144, 167–68 (1992).

¹⁸ See *New York*, 505 U.S. at 167 (“[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress’ power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.”); *FERC v. Mississippi*, 456 U.S. 742, 764–65 (1982); *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981).

¹⁹ See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298, 318 (1992); *Moorman Mfg. v. Bair*, 437 U.S. 267, 280 (1978); WALTER HELLERSTEIN, *STATE TAXATION* ¶ 4.24 (3d ed. 2010) (“Congress possesses unquestioned power under the Commerce Clause to regulate state taxation of interstate commerce.”); Part IV.A *infra*.

considered simpatico with the anti-commandeering principle—even when they dictate how particular state taxes are to be imposed—because they afford states the formal option of not imposing the regulated tax at all. But states must raise revenue to exist. And because the states rely (to greater and lesser degrees) on the specific levies they presently impose, they may lack any practical choice but to continue imposing them. (Indeed, the financial consequences to a state in forgoing a particular tax could be more severe than withdrawing from Medicaid.) Hence, federal laws specifying the terms on which the states may implement such taxes, though not formally requiring the states to impose them, may now constitute impermissible commandeering.

This would be unfortunate. The number, complexity, and heterogeneity of state and local tax systems almost certainly impose a number of unnecessary costs on the American economy.²⁰ And as the Court itself has long recognized, Congress is much better suited institutionally than the judiciary, through its rather clumsy enforcement of the dormant Commerce Clause, to address these complex problems.²¹

This article proceeds in four parts. Part I provides some background concerning the relevant points of constitutional law—namely, the precise metes and bounds of the anti-commandeering principle. Next, Part II sets out the details of the Supreme Court’s Medicaid holding in the *Health Care Cases*. Part III then explains how this holding has effectively re-conceptualized the meaning of federal commands to state governments, and thus extended the reach of the anti-commandeering principle. Finally, Part IV presents the federal regulation of state and local taxes as a case study, illustrating

²⁰ See Daniel Shaviro, *An Economic and Political Look at Federalism in Taxation*, 90 MICH. L. REV. 895, 898–930 (1992); Part IV.C *infra*.

²¹ See, e.g., *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (White, J., concurring); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 476 (1959) (Frankfurter, J., dissenting); *McCarroll v. Dixie Greyhound Lines*, 309 U.S. 176, 188–89 (1940) (Black, J., dissenting); JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE AND LOCAL TAXATION: CASES AND MATERIALS* 205–08 (8th ed. 2005).

how the new meaning of commandeering may entail some troubling practical consequences.

I. THE ANTI-COMMANDEERING PRINCIPLE (AND ITS LIMITS)

A. *The central idea*

It is well settled that Congress lacks the power to command the states (or their political subdivisions) to govern their residents in a particular fashion.²² As the Supreme Court has explained, any such “commandeering” of state governments is “inconsistent with the federal structure of our Government established by the Constitution.”²³ Two decisions from the 1990s, *New York v. United States*²⁴ and *Printz v. United States*,²⁵ cemented this principle into constitutional doctrine (though arguably the rule predates those decisions considerably).²⁶

²² See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (“[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.”) (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* §3.9, at 324 (3d ed. 2006); KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 142 (17th ed. 2010); Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1642 (2006).

²³ *New York v. United States*, 505 U.S. 144, 177 (1992).

²⁴ 505 U.S. 144 (1992).

²⁵ 521 U.S. 898 (1992).

²⁶ See *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 288 (1981) (holding that the challenged statute was constitutional because there was “no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program”); *FERC v. Mississippi*, 456 U.S. 742, 765 (1982) (upholding the Public Utility Regulatory Policies Act in part on the ground that there was “nothing in PURPA ‘directly compelling’ the States to enact a legislative program”). See also *South Carolina v. Baker*, 485 U.S. 505, 513 (1988); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 556 (1985); *Coyle v. Smith*, 221 U.S. 559, 565 (1911).

In *New York*, the Court struck down the so-called “take title” provision of the Low-Level Radioactive Waste Policy Amendments of 1985, which had directed the states either (a) to regulate low-level radioactive waste “according to the instructions of Congress,” or (b) to accept title to all such waste generated within their borders (an enormous financial liability).²⁷ The Court held that “[e]ither type of federal action would ‘commandeer’ state governments into the service of the federal regulatory purposes, and would for this reason be inconsistent with the Constitution’s division of authority between federal and state governments.”²⁸ Similarly, the Court in *Printz* invalidated an interim provision of the Brady Handgun Violence Prevention Act that directed state or local Chief Law Enforcement Officers to conduct background checks on persons seeking to purchase handguns.²⁹ Summarizing its holding in plain terms, the Court declared that the “federal government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.”³⁰

Though important—perhaps even foundational—this anti-commandeering principle is narrower than might first appear. There are three important limits to its reach: (1) it only applies to federal laws regulating the states in their sovereign capacities, as regulators or governors of their inhabitants; (2) it only forbids federal laws that require the states to take affirmative acts, not those merely prohibiting state action; and (3) it does not forbid Congress from enticing the states to regulate or govern in particular ways, even if Congress could not command the states to do the same. The remainder of this Part explains these limits in turn.

B. States in their sovereign and proprietary capacities

A critical limit on the anti-commandeering principle is that it only forbids federal laws that dictate how a state *regulates* or *governs*. It

²⁷ *New York*, 505 U.S. at 175–77.

²⁸ *Id.* at 175.

²⁹ *Printz*, 521 U.S. 898 (1997).

³⁰ *Id.* at 935.

does not address the scores of federal laws that regulate the states' behavior in other roles, such as when they act as employers, proprietors, or polluters.³¹ So-called “generally applicable legislation”—like the Fair Labor Standards Act,³² which imposes minimum-wage and maximum-hour requirements on all employers in the United States of a certain size³³—does not “commandeer” the states because it does not force them to implement, administer, or enforce federal law.³⁴ Rather, such legislation merely requires state governments to conform their behavior to a particular federal norm, a norm imposed on every entity in the country engaged in that same activity. Statutes like the FLSA treat the states as *objects* of federal regulation, not as tools for the implementation of a federal legislative program.³⁵

The Supreme Court in 1985 upheld Congress’s application of such generally applicable laws (like the FLSA) to state governments and their political subdivisions in *Garcia v. San Antonio Metropolitan Transit Agency*.³⁶ And when the Court later decided *New York* and *Printz*, the justices were careful to distinguish *Garcia*, thus preserving its holding.³⁷ Moreover, in 2000 the Court reaffirmed Congress’s authority to regulate the conduct of the states through generally

³¹ See SULLIVAN & GUNTHER, *supra* note 22, at 142 (explaining that neither *New York* nor *Printz* “questioned Congress’s ability to regulate the states’ own conduct under general laws that also regulate the similar conduct of private actors”).

³² 209 U.S.C. §201 et seq. (2012).

³³ See *id.* §§ 203(d), 203(e)(2), 206–207 (2012).

³⁴ See *Reno v. Condon*, 528 U.S. 141, 151 (2000) (concluding that, because the challenged federal law did “not require the States in their sovereign capacity to regulate their own citizens,” but instead “regulate[d] the States as the owners of data bases,” it was “consistent with the constitutional principles enunciated in *New York* and *Printz*”). Cf. *Printz*, 521 U.S. at 932; *New York*, 505 U.S. at 161.

³⁵ See SULLIVAN & GUNTHER, *supra* note 22, at 142.

³⁶ *Garcia v. San Antonio Metro. Transit Agency*, 469 U.S. 528 (1985).

³⁷ See *Printz*, 521 U.S. at 932; *New York*, 505 U.S. at 160–61; Matthew D. Adler & Seth F. Kreimer, *The New Etiquette of Federalism*: New York, *Printz*, and *Yetsky*, 1998 SUP. CT. REV. 71, 110.

applicable legislation in *Reno v. Condon*,³⁸ thus attesting to *Garcia*’s continuing vitality.³⁹ As the Court explained in *Condon*, the challenged federal statute (the Driver’s Privacy Protection Act) was constitutional because it “regulates the States as the owners of data bases,” not “in their sovereign capacity to regulate their own citizens.”⁴⁰

C. Prohibitions and commands to act

A second important limit on the anti-commandeering principle is that it only forbids federal laws that command state governments to take *affirmative steps* in regulating or governing their residents. It does not extend to mere prohibitions—commands that states *not* regulate in a particular fashion. This must be so, for otherwise the anti-commandeering principle would swallow up the doctrine of preemption, a doctrine essentially dictated by the text of the Constitution itself.

The Supremacy Clause of Article VI provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁴¹ Since the earliest days of the Republic, this language has been understood as dictating that, when federal law and a state law conflict, the state law—whether in the form of a state constitutional provision, statute, administrative regulation, or common law rule of liability—is inoperable.⁴² A federal statute that

³⁸ 528 U.S. 141 (2000).

³⁹ *Id.* at 151.

⁴⁰ *Id.*

⁴¹ U.S. CONST. art. VI.

⁴² See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). See also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (“since our decision in [*McCulloch*], it has been settled that state law that conflicts with federal law is “without effect”) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

preempts state law—most obviously, when it does so through an express preemption clause—is, in essence, a command by Congress that the states *not* regulate or govern in a particular way. Thus, if the anti-commandeering principle and the doctrine of preemption are to coexist, the former can only apply to directives requiring the states affirmatively to act. Federal commands that states not regulate cannot be a commandeering.⁴³

This distinction between prohibitions and mandates to take affirmative acts may be somewhat artificial, especially at the edges. As the lengthy debate as to whether the ACA’s minimum coverage provision regulates “activity” or “inactivity” illustrated, prohibitions can often be re-characterized as commands to act, and vice-versa.⁴⁴ Still, the action-inaction distinction is generally respected in law,⁴⁵

⁴³ See Siegel, *supra* note 22 (distinguishing preemption from commandeering, while noting that the former might actually interfere more with a state’s sovereign interests); Rachel Preiser, Note, *Staking Out the Border Between Commandeering and Conditional Preemption: Is the Driver’s Privacy Protection Act Constitutional Under the Tenth Amendment?*, 98 MICH. L. REV. 514, 537 (1999) (“The *New York* and *Printz* Courts recognized the constitutionality of federal preemption of state law, thereby affirming the distinction between preemption and impermissible federal commandeering of the states.”).

⁴⁴ For instance, consider §201(a) of the Civil Rights Act of 1964. It provides that “[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.” 42 U.S.C. §2000a(a) (2012). The Act further provides that all hotels are “places of public accommodation.” See *id.* §2000a(b)(1). Does this provision merely prohibit hotels from engaging in discrimination on the basis of race, color, religion, or national origin? Or does it compel hoteliers into action, forcing them to let rooms to persons whom they otherwise might not serve?

⁴⁵ Indeed, it was critical to the Court’s conclusion in the *Health Care Cases* that the minimum coverage provision, because it regulated “inactivity,” exceeded Congress’s authority to regulate interstate commerce. See *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2589 (2012) (“To an economist, perhaps, there is no difference between activity and inactivity But the distinction between doing something and doing

and it accurately captures the Court’s precise descriptions of the anti-commandeering principle in its opinions—descriptions that presumably were crafted with the implications for preemption doctrine in mind. For instance, the Court stated in *Condon* that the Driver’s Privacy Protection Act did not commandeer the states because “[i]t does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals.”⁴⁶ As such, this action-prohibition distinction is widely accepted as setting a boundary between unconstitutional commandeering and permissible regulations.

D. Commands, enticements, and coercion

A final limitation on the anti-commandeering principle—and the one most immediately relevant in the *Health Care Cases*—is that, though Congress cannot command the states to take affirmative steps to govern in a particular fashion, nothing precludes Congress from encouraging the states to do the same through the enticement of federal largesse. The first clause of Article I, section 8 grants Congress the authority to “lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”⁴⁷ Congress can use this spending power to offer funding to state governments on the condition they accept certain strings that come attached. To be sure, the spending program must promote the “general welfare”; the spending conditions must be germane to the purposes of the spending program; the conditions must be unambiguous (so the states can fully appreciate the obligations they are accepting); and the conditions cannot induce the states to act unconstitutionally.⁴⁸ But assuming

nothing would not have been lost on the Framers, who were ‘practical statesmen,’ not metaphysical philosophers.”) (quoting *Industrial Union Dept., AFL–CIO v. American Petroleum Inst.*, 448 U.S. 607, 673 (1980) (Rehnquist, J., concurring in judgment)).

⁴⁶ *Reno v. Condon*, 528 U.S. 141, 151 (2000).

⁴⁷ U.S. CONST. art. I, § 8, cl. 1.

⁴⁸ See *South Dakota v. Dole*, 483 U.S. 205, 207–11 (1986).

these rather minimal requirements are satisfied, nothing prevents Congress from achieving indirectly (through conditional spending) what would constitute an impermissible commandeering if directly compelled. As the Court explained in *New York*, when Congress employs such a “permissible method of encouraging a State to conform to federal policy choices, the residents of the State retain the ultimate decision as to whether or not the State will comply.”⁴⁹

Critical to the constitutionality of such conditional spending, of course, is that the states’ acceptance of the strings attached to the federal dollars is voluntary. If the conditions were actually commands, they would amount to a commandeering (assuming those conditions required the states to take affirmative steps in their sovereign capacities). A natural question, then, is whether the terms imposed on the states’ receipt of federal funds—funds to which the states have no constitutional entitlement—can ever be so coercive as to constitute compulsion.

Two Supreme Court decisions predating the *Health Care Cases* suggested that they could. In the 1987 case of *South Dakota v. Dole*,⁵⁰ the Court acknowledged that “[o]ur decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”⁵¹ This sentence in *Dole* quoted the Court’s 1937 decision in *Steward Machine Co. v. Davis*,⁵² a case in which the Court proffered a similar suggestion. Specifically, in upholding the federal spending program at issue, the *Steward Machine* Court noted that “[n]othing in the case suggests the exertion of a power akin to undue influence.”⁵³

Read in their entirety, though, *Dole* and *Steward Machine* are enigmatic. Only five sentences after seeming to concede (in the language quoted above) that spending conditions can be coercive, the *Dole* Court threw some cold water on the idea:

⁴⁹ *New York v. United States*, 505 U.S. 144, 168 (1992).

⁵⁰ 438 U.S. 203 (1987).

⁵¹ *Dole*, 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937)).

⁵² 301 U.S. 548 (1937).

⁵³ *Id.* at 590.

“[T]o hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties. The outcome of such a doctrine is the acceptance of a philosophical determinism by which choice becomes impossible. Till now the law has been guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.”⁵⁴

This, too, was a direct quote from *Steward Machine*. And a closer examination of *Steward Machine* reveals that the Court was really just assuming *arguendo* the existence of a coercion doctrine. Here is the relevant passage from *Steward Machine* in its entirety:

Nothing in the case suggests the exertion of a power akin to undue influence, *if we assume that such a concept can ever be applied with fitness to the relations between state and nation*. Even on that assumption the location of the point at which pressure turns into compulsion, and ceases to be inducement, would be a question of degree, at times, perhaps, of fact.⁵⁵

Thus, while *Dole* and *Steward Machine* were often cited for the proposition that “Congress may not employ the spending power in such a way as to ‘coerce’ the states into compliance with the federal objective,”⁵⁶ it was unclear, as of June 27, 2012, whether this was actually a governing rule of constitutional law. The Supreme Court had *never* invalidated a federal spending condition imposed on the

⁵⁴ *Dole*, 483 U.S. at 211 (quoting *Steward Machine*, 301 U.S. at 589–90).

⁵⁵ *Steward Machine*, 301 U.S. at 590 (emphasis added).

⁵⁶ *Florida v. U.S. Dep’t of Health and Human Servs.*, 648 F.3d 1235, 1264 (11th Cir. 2011), *rev’d*, *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012). *See also* *Van Wyhe v. Reisch*, 581 F.3d 639, 650 (8th Cir. 2009); *School District of City of Pontiac v. Secretary of U.S. Dept. of Educ.*, 512 F.3d 252, 277 n.2 (6th Cir. 2008); *Madison v. Virginia*, 474 F.3d 118, 124 (4th Cir. 2006); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 278–79 (5th Cir. 2005); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 128 (1st Cir. 2003).

states as coercive. Nor had any other court, at any level, in the history of the United States. The *Health Care Cases* changed things.

II. THE *HEALTH CARE CASES*

The Court's decision in the *Health Care Cases* was a big, *big* deal. In sustaining the central provisions of the ACA, the Court placed its imprimatur on a hugely important federal statute—one with the potential to fundamentally alter the terms of the modern welfare state.⁵⁷ Perhaps as important, the Chief Justice's opinion was a master stroke of judicial statesmanship.⁵⁸ In this most partisan of cases, Roberts crossed ideological lines to uphold President Obama's defining legislative achievement, enabling the Court to claim the mantles of bipartisanship and judicial modesty.⁵⁹ This elevation of the Court above the polarized, partisan fray may prove quite valuable to its long-term institutional standing.⁶⁰ It will buffer the Court, at least

⁵⁷ See Balkin, *supra* note 2; Fishkin, *supra* note 4.

⁵⁸ See Bradley Joondeph, *A Marbury for our time*, SCOTUSBLOG (Jun. 29, 2012, 2:36 PM), <http://www.scotusblog.com/2012/06/a-marbury-for-our-time/>.

⁵⁹ See Erwin Chemerinsky, *A surprise?*, SCOTUSBLOG (Jun. 29, 2012, 9:27 AM), <http://www.scotusblog.com/2012/06/a-surprise/>; Jeffrey Rosen, *Big Chief: How to Understand John Roberts*, NEW REPUBLIC, Aug. 2, 2012. *But see* David Bernstein, *Rosen on Roberts as Statesman*, VOLOKH CONSPIRACY, July 15, 2012, available at <http://www.volokh.com/2012/07/15/rosen-on-roberts-as-statesman/> (contending that “one thing seems pretty certain: the way Roberts handled the case has not actually served the goal of enhancing the Court's reputation of being “above politics”).

⁶⁰ See David L. Franklin, *Why Did Roberts Do It? To Save the Court*, SLATE, June 28, 2012, available at http://www.slate.com/articles/news_and_politics/jurisprudence/2012/06/john_roberts_broke_with_conservatives_to_preserve_the_supreme_court_s_legitimacy.html; Friedman, *Obamacare*, *supra* note __; Adam Winkler, *The Roberts Court is born*, SCOTUSBLOG (Jun. 28, 2012, 12:01 PM), <http://www.scotusblog.com/2012/06/the-roberts-court-is-born/>. *But see* Ilya Somin, *The Impact of the Individual Mandate Decision on the Supreme Court's Legitimacy*, VOLOKH CONSPIRACY, July 13, 2012, available at <http://www.volokh.com/2012/07/13/the-impact-of-the-individual-mandate->

for some time, from attacks that the five Republican appointees are “conservative judicial activists.”⁶¹ If the Roberts Court tacks more conservatively on issues like affirmative action, voting rights, or the separation of national powers—a possibility that hardly seems remote—the predictable accusations of partisanship are less likely to stick. The *Health Case Cases* will stand as a super-salient counter-example.

Much of the commentary on the Court’s decision thus far has focused on the Court’s upholding of the individual mandate, the linchpin of the ACA’s broader regulation of the individual insurance market. This was the provision that several lower courts had held exceeded Congress’s enumerated powers,⁶² and which—given its centrality to the Act’s regulatory scheme—threatened to bring down the entire ACA (if the Supreme Court found it both unconstitutional and inseverable). But the Court also decided a second very important question in the *Health Care Cases*, one that many believe was actually more significant as a matter of constitutional law.⁶³ That question

[decision-on-the-supreme-courts-legitimacy/](#) (arguing that the decision may have detracted from the Court’s legitimacy more than it enhanced it).

⁶¹ See, e.g., Editorial, *It’s Nice To Be Rich*, N.Y. TIMES, June 28, 2008 (calling the Court’s decision in *Davis v. FEC*, 554 U.S. 724 (2008), “conservative judicial activism of the first order”); Adam Cohen, *Last Term’s Winner at the Supreme Court: Judicial Activism*, N.Y. TIMES, July 9, 2007 (arguing that the Roberts Court was embracing a “new conservative judicial activism”).

⁶² See *Florida v. U.S. Dept. of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011); *Goudy-Bachman v. U.S. Dept. of Health & Human Servs.*, 811 F. Supp. 2d 1086 (M.D. Pa. 2011); *Florida v. U.S. Dept. of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011); *Virginia v. Sebelius*, 702 F. Supp. 2d 598 (W.D. Va. 2010).

⁶³ See, e.g., Charles Fried, *The June surprises: Balls, strikes, and the fog of war*, SCOTUSBLOG (Aug. 2, 2012, 12:19 PM), <http://www.scotusblog.com/2012/08/the-june-surprises-balls-strikes-and-the-fog-of-war/> (“But the Commerce Clause activity/inactivity argument is so artificial and strained that at the end of the day it may not be very constraining, easily gotten around by skillful drafting. The Medicaid expansion invalidation, however, has potential for cutting a broad swath through many programs hitherto seen as unassailable under the rubric of cooperative federalism.”); Pamela S. Karlan, *No Respite for Liberals*, N.Y.

was whether the ACA coerced the states into participating in the Act's massive expansion of the Medicaid program, thus exceeding the scope of Congress's spending power.

A. The ACA's expansion of Medicaid

Again, Medicaid is the joint federal-state spending program that offers health insurance to the indigent and the disabled. States are not required to participate in the program.⁶⁴ But if they do, they must abide by a variety of standards to qualify for the associated federal funding (known as the "federal medical assistance percentage," or FMAP).⁶⁵ The size of the FMAP varies by state, generally ranging from 50 to 83 percent of the program's costs.⁶⁶ Congress originally enacted Medicaid in 1965 as Title XIX of the Social Security Act, and it is now the single largest federal aid program to the states, accounting for 45 percent of all federal grant-in-aid to state governments.⁶⁷ It is the third largest domestic spending program (behind only Social Security and Medicare), providing health coverage to nearly 60 million Americans and accounting for 8 percent of the

TIMES, Jun. 30, 2012 ("That the individual mandate was upheld should not overshadow the court's ruling on Medicaid expansion—the part of the ruling that is most likely to affect other legislation in the near future."); Gillian Metzger, *Something for everyone*, SCOTUSBLOG (Jun. 28, 2012, 5:08 PM), <http://www.scotusblog.com/2012/06/something-for-everyone/> ("The Spending Clause ruling portends greater import."); Erin Ryan, *Spending Power Bargaining After Sebelius*, at 1 (2012), available at <http://ssrn.com/abstract=2119241> ("[T]he most immediately significant portion of the ruling—and one with far more significance for most regulatory governance—is the part of the decision limiting the federal spending power that authorizes Medicaid.").

⁶⁴ See *Frew v. Hawkins*, 540 U.S. 431, 433 (2004); *Harris v. McRae*, 448 U.S. 297, 301 (1980).

⁶⁵ See 42 U.S.C. §1396c (2012); *Frew*, 540 U.S. at 433; *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 502 (1990); *Harris v. McRae*, 448 U.S. at 301.

⁶⁶ 42 U.S.C. §1396d(b).

⁶⁷ KAISER COMMISSION ON MEDICAID AND THE UNINSURED, MEDICAID MATTERS: UNDERSTANDING MEDICAID'S ROLE IN OUR HEALTH CARE SYSTEM 2 (2011), available at <http://www.kff.org/medicaid/upload/8165.pdf>.

federal budget.⁶⁸ Medicaid's present role in the states' finances is staggering: In fiscal year 2008, state governments collectively spent 16.3 percent of their general fund dollars on Medicaid, and the program accounted for 20.7 percent of state spending in total.⁶⁹

Wholly aside from the ACA, federal law imposes numerous requirements on states that participate in Medicaid (all of which do).⁷⁰ If a state fails to comply with these requirements, "the Secretary [of Health and Human Services] shall notify such State agency that further payments will not be made to the State (or, in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure), until the Secretary is satisfied that there will no longer be any such failure to comply."⁷¹ At the same time, federal law has always afforded states a fair degree of flexibility in structuring their own distinct Medicaid programs.⁷² Historically, the states have retained discretion over matters such as coverage eligibility levels, provider reimbursement rates, and (with some limitations) the range of services covered.⁷³

The ACA reduced this state-level discretion. Most importantly, the Act imposed three new, related requirements: (1) states must extend their coverage to non-disabled childless adults under the age of 65⁷⁴; (2) they must, at a minimum, set their coverage eligibility level at 133 percent of the federal poverty level (in practice, actually 138 percent of the federal poverty level)⁷⁵; and (3) they must guarantee all

⁶⁸ *Id.* at 1–2.

⁶⁹ KAISER COMMISSION ON MEDICAID AND THE UNINSURED, HOPING FOR ECONOMIC RECOVERY, PREPARING FOR HEALTH REFORM: A LOOK AT MEDICAID SPENDING, COVERAGE AND POLICY TRENDS 11 & Figure 3 (2010), available at <http://www.kff.org/medicaid/upload/8105.pdf>.

⁷⁰ *See generally* 42 U.S.C. §1396a(a) (2012).

⁷¹ 42 U.S.C. §1396c (2012).

⁷² *See* Brief for Respondents (Medicaid) at 3–8, *Florida v. Dept. of Health & Human Servs.*, No. 11–400 (S. Ct. Feb. 2012).

⁷³ *See* *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2601 (2012).

⁷⁴ *Id.*

⁷⁵ Section 2001(a)(1) of the ACA mandates that, beginning in 2014, states must provide coverage to all individuals under the age of 65 (including childless adults) with incomes under 133 percent of the federal poverty level.

covered individuals a so-called “benchmark” benefits package.⁷⁶ Together, these provisions constitute a substantial expansion of the program: participating states must provide minimum, benchmark coverage to all their non-elderly residents with incomes up to 138 percent of the federal poverty level.

Until now, Medicaid has never included non-disabled childless adults. And presently the median state eligibility level is only 63 percent of the federal poverty level.⁷⁷ (Indeed, seventeen states have eligibility cutoffs that are below *half* the federal poverty rate.⁷⁸) The ACA (if all states participate) will thus increase enrollment in Medicaid by somewhere between 16 and 23 million individuals by 2019.⁷⁹ The federal government will reimburse states for the bulk of the costs attributable to this expansion, but it will not cover all of them. As provided in §1201 of the Health Care and Education Reconciliation Act—the law enacted three days after the ACA to amend some of its provisions—the United States will pay for 100

Given the definition of modified adjusted gross income dictated by §1004 of the Health Care and Education Reconciliation Act, this effectively means 138 percent of the federal poverty level. For a more detailed explanation, see KAISER COMMISSION ON MEDICAID AND THE UNINSURED, EXPLAINING HEALTH REFORM: THE NEW RULES FOR DETERMINING INCOME UNDER MEDICAID IN 2014 (2011), available at www.kff.org/healthreform/upload/8194.pdf.

⁷⁶ 42 U.S.C. §§1396a(k)(1), 1396u–7(b)(5), 18022(b) (2012).

⁷⁷ See KAISER COMMISSION ON MEDICAID AND THE UNINSURED, PERFORMING UNDER PRESSURE: ANNUAL FINDINGS OF A 50-STATE SURVEY OF ELIGIBILITY, ENROLLMENT, RENEWAL, AND COST-SHARING POLICIES IN MEDICAID AND CHIP, 2011–2012, at 11 and fig.11 (Jan. 2012), available at <http://www.kff.org/medicaid/upload/8272.pdf>.

⁷⁸ UNDERSTANDING MEDICAID’S ROLE IN OUR HEALTH CARE SYSTEM, *supra* note 67, at 1.

⁷⁹ KAISER COMMISSION ON MEDICAID AND THE UNINSURED, MEDICAID COVERAGE AND SPENDING IN HEALTH REFORM: NATIONAL AND STATE-BY-STATE RESULTS FOR ADULTS AT OR BELOW 133% FPL, at 2–5 (May 2012), available at <http://www.kff.org/healthreform/upload/medicaid-coverage-and-spending-in-health-reform-national-and-state-by-state-results-for-adults-at-or-below-133-fpl.pdf>.

percent of these expenses from 2014 to 2016, 95 percent in 2017, 94 percent in 2018, 93 percent in 2019, and 90 percent thereafter.⁸⁰

B. The Supreme Court's Medicaid holding

In their challenge to the ACA, the twenty-six state plaintiffs claimed that their existing, pre-ACA Medicaid funding streams are simply too massive for the states to have any real option of withdrawing from the program.⁸¹ The Act, they argued, “threatens States with the loss of every penny of federal funding under the single largest grant-in-aid program in existence—literally *billions* of dollars each year—if they do not capitulate to Congress’ steep new demands.”⁸² To them, there was “no plausible argument that a State could afford to turn down such a massive federal inducement, particularly when doing so would mean assuming the full burden of covering its neediest residents’ medical costs.”⁸³

By a margin of 7-to-2, the Supreme Court agreed, though no single opinion garnered five votes. Justices Scalia, Kennedy, Thomas, and Alito would have invalidated the ACA’s Medicaid expansion *in toto*.⁸⁴ Chief Justice Roberts’s opinion, joined on this point by Justices Breyer and Kagan, was far less sweeping. It concluded that the ACA’s Medicaid expansion conditions were indeed coercive, but only insofar as they operated as strings attached to the states’ *existing* Medicaid

⁸⁰ Health Care and Education Reconciliation Act §1201 (codified at 42 U.S.C. §1396d(y)).

⁸¹ See Brief of State Petitioners on Medicaid at 23, *Florida v. U.S. Dept. of Health & Human Servs.*, No. 11–400 (S. Ct. Jan. 10, 2012).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2643 (2012) (opinion of Scalia, Kennedy, Thomas, and Alito, JJ.).

funding.⁸⁵ As the narrowest rationale for sustaining the Court’s judgment, Roberts’s opinion on this point is controlling.⁸⁶

The Chief Justice began his analysis by explaining that Congress could certainly “condition the receipt of funds on the States’ complying with restrictions on the use of those funds, because that is the means by which Congress ensures that the funds are spent according to its view of the ‘general Welfare.’”⁸⁷ Under the ACA, though, the states’ failure to comply with the new conditions did not just jeopardize the funds the federal government was offering for Medicaid expansion. Rather, the conditions took “the form of threats to terminate other significant independent grants”—the states’ preexisting Medicaid dollars.⁸⁸ Consequently, “the conditions are properly viewed as a means of pressuring the States to accept policy changes.”⁸⁹

Such pressuring, achieved through the tool of conditional spending, is generally no more than “encouragement,” and thus perfectly constitutional.⁹⁰ But in the ACA, explained Roberts, this pressure crossed the line into compulsion.⁹¹ The “financial ‘inducement’ Congress has chosen is much more than ‘relatively mild encouragement,’” but instead “a gun to the head.”⁹² Again, 42 U.S.C. §1396c gives the Secretary the authority to terminate the entirety of a state’s federal Medicaid reimbursement if the state fails to comply

⁸⁵ *Id.* at 2607 (opinion of Roberts, C.J.) (“What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”).

⁸⁶ *See Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

⁸⁷ *NFIB*, 132 S. Ct. at 2603–04.

⁸⁸ *Id.* at 2604.

⁸⁹ *Id.*

⁹⁰ *Id.* (noting that the Court in *Dole* had “found that the inducement was not impermissibly coercive, because Congress was offering only ‘relatively mild encouragement to the States.’”).

⁹¹ *Id.*

⁹² *Id.*

with any of the Act's requirements. Thus, a state choosing not to expand its Medicaid coverage as prescribed by the ACA stood "to lose not merely 'a relatively small percentage' of its existing Medicaid funding, but *all* of it."⁹³ And the states' dependence on the existing Medicaid program is stunning. Not only is the states' financial reliance on existing federal Medicaid reimbursements enormous,⁹⁴ but the states "have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid."⁹⁵ This dependence, reasoned the Chief Justice, means that Congress was effectively leaving the states with no choice: "The threatened loss of over 10 percent of a State's overall budget, in contrast [to the funds at issue in *Dole*], is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."⁹⁶

Importantly, reasoned Roberts, the Act's Medicaid expansion did not simply constitute "a modification of the existing Medicaid program."⁹⁷ Instead, it represented "a new program," a "shift in kind, not merely degree."⁹⁸ Under the ACA, "Medicaid is transformed into a program to meet the health care needs of the entire nonelderly population with income below 133 percent of the federal poverty level."⁹⁹ Rather than continuing as a "program to care for the neediest among us," the ACA makes Medicaid "an element of a comprehensive national plan to provide universal health insurance coverage."¹⁰⁰ Indeed, Congress recognized this qualitative shift in its structuring of the program's expansion; there is a separate funding provision for those persons "newly eligible" for Medicaid, and the federal reimbursement rate for these recipients differs from that for those

⁹³ *Id.* (emphasis original).

⁹⁴ *Id.* ("Medicaid spending accounts for over 20 percent of the average State's total budget, with federal funds covering 50 to 83 percent of those costs.")

⁹⁵ *Id.*

⁹⁶ *Id.* at 2604–05.

⁹⁷ *Id.* at 2605.

⁹⁸ *Id.*

⁹⁹ *Id.* at 2606.

¹⁰⁰ *Id.*

previously eligible.¹⁰¹ Moreover, the states could hardly have anticipated such a significant change in Medicaid when they originally agreed to participate.¹⁰² No state could have expected that “Congress’s reservation of the right to ‘alter’ or ‘amend’ the Medicaid program included the power to transform it so dramatically.”¹⁰³

Thus, Congress was not merely amending the terms under which states could spend dollars provided by the federal government. Congress was effectively forcing the states to implement the ACA’s distinct Medicaid-expansion program by “threatening the funds for the existing Medicaid program.”¹⁰⁴ Given the states’ reliance on that existing program, this threat was coercive.¹⁰⁵ Congress was effectively commanding the states to govern according to Congress’s instructions.¹⁰⁶

This conclusion did not render the ACA’s expansion of Medicaid unconstitutional in its entirety, however. It only meant that Congress could not “penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”¹⁰⁷ Hence, forbidding the Secretary from applying §1396c “to withdraw existing Medicaid funds for failure to comply with the requirements set out in the expansion” fully remedied the constitutional violation.¹⁰⁸ The Court therefore validated Congress’s authority to attach conditions to the ACA’s *new* funding: “Nothing in our opinion precludes Congress from offering funds under the Affordable Care Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use.”¹⁰⁹

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2605.

¹⁰⁵ *Id.* at 2608 (“As for the Medicaid expansion, that portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding.”).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 2607.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

After the *Health Care Cases*, then, the states have a choice—or, really, two choices. They can choose whether to continue participating in the pre-ACA Medicaid program, according to the conditions previously laid down by Congress. And they can choose whether to participate in the Act’s expansion of Medicaid, according to the terms set out in the ACA.¹¹⁰

III. THE NEW MEANING OF COMMANDS (AND COMMANDEERING)

The Court’s decision in the *Health Care Cases* was the first in United States history to invalidate a federal spending provision on the ground that it coerced the states, and it immediately sent constitutional lawyers scurrying to identify other programs that may now be constitutionally suspect.¹¹¹ As others have explained, the decision could mark a sea change in the scope of Congress’s spending power; significant aspects of major federal statutes, such as the Clean Air Act or the No Child Left Behind Act, may now be unconstitutional.¹¹² But the decision’s implications do not stop there. Properly understood, the underlying rationale of the Court’s Medicaid holding concerns not so much Congress’s spending authority, but the

¹¹⁰ See *Where Each State Stands on ACA’s Medicaid Expansion*, THE ADVISORY BOARD COMPANY (Jul. 17, 2012, 3:00 PM), <http://www.advisory.com/Daily-Briefing/2012/07/05/Where-each-state-stands-of-the-Medicaid-expansion> (“Texas, Louisiana, Mississippi, Florida, and South Carolina ‘Will Not Participate’ in the Medicaid Expansion.”); Robert Pear & Michael Cooper, *Reluctance in Some States Over Medicaid Expansion*, N.Y. TIMES (Jun. 29, 2012).

¹¹¹ See Adler & Stewart, *supra* note 15; Nicole Huberfield, *Starting to Work Beneath the Surface of the Medicaid Holding*, CONCURRING OPINIONS, June 29, 2012, available at <http://www.concurringopinions.com/archives/2012/06/starting-to-work-beneath-the-surface-of-the-medicaid-holding.html> (“Undoubtedly we will see future coercion cases, and not just in healthcare. While Medicaid is one of the oldest conditional spending programs, it is one of many. Other conditional spending programs include educational funding, transportation funding, environmental protection laws, and welfare laws, just to name a few.”).

¹¹² See *id.*

broader issue of what constitutes a federal “command” to the states. In fine, the *Health Care Cases* re-conceptualized what qualifies as federal *compulsion*, and thus extended the reach of the anti-commandeering doctrine.

To see this, it is important to deconstruct exactly why the Court found the ACA’s Medicaid provisions unconstitutional. The ultimate constitutional problem was that the Act commandeered the states—in the words of the Chief Justice, it “require[d] the States to govern according to Congress’ instructions.”¹¹³ But the ACA did not formally require the states to do *anything* with respect to Medicaid; as a strictly legal matter, the states were free to walk away from the program if they so desired.¹¹⁴ Nonetheless, the Court treated the conditions that the ACA attached to the states’ existing Medicaid funds as obligations because, given the practical realities facing the states, they had no “genuine choice” or “real option” but to accept Congress’s conditions.¹¹⁵

The critical move in the Court’s analysis, then, was how it framed the inquiry as to whether a federal law “commands” the states. The *Health Care Cases* hold that the answer turns on more than legal form. The inquiry is now a practical one: All things considered, do the states have a *genuine* choice and a *real* option of rejecting the federal government’s conditions? If the states lack the practical ability to say no, the federal law—even if it imposes no formal legal obligations on the states—must be understood as issuing a command. And if that command requires the states to take affirmative acts in their sovereign capacities, then the federal law violates the anti-commandeering principle.

Again, the greatest practical significance of this holding lies in its application to federal-state conditional spending programs, the precise context in which the case arose. Because of the severe financial consequences the states would suffer in withdrawing from various

¹¹³ *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (quoting *New York v. United States*, 505 U.S. 144, 162 (1992)).

¹¹⁴ See, e.g., Brief for Respondents (Medicaid) at 17, *Florida v. Dept. of Health & Human Servs.*, No. 11–400 (S. Ct. Feb. 2012) (“Petitioners do not dispute that they are free, as a matter of law, to turn down federal Medicaid funds if they view program conditions as sufficiently contrary to their interests.”).

¹¹⁵ *NFIB*, 132 S. Ct. at 2605, 2607–08.

federal grant-in-aid programs, several such programs may now be vulnerable to constitutional challenges. But the rationale of the *Health Care Cases* extends further. It applies to *any* federal law in which two conditions hold: (1) the law presents the states with a choice, and (2) one of the alternatives is for the states to govern according to Congress’s instructions. As such, this new conception of “commands” applies as much to conditional *prohibitions* as it does to conditional enticements. Just as the states might lack a real choice of withdrawing from a federal spending program, they might likewise lack the practical capacity to step aside and not govern in a particular field. If so, laws previously understood to be perfectly constitutional—as uncontroversial instances of the conditional federal preemption of state law—may now amount to impermissible commandeering.

As an illustration, suppose Congress enacts a statute that forbids the states from governing on the subject of X unless they do so according to federal instructions A, B, and C. Prior to the *Health Care Cases*, the statute would have been understood as simply prohibitory, and hence constitutional. It does not formally *command* the states to do anything, but merely preempts certain state laws (those governing on the subject of X) that do not conform to a set of federal norms (articulated in instructions A, B, and C). As explained in *New York*, the Supreme Court has long “recognized Congress’ power to offer States the choice of regulating [an] activity according to federal standards or having state law pre-empted by federal regulation.”¹¹⁶ If a state’s inhabitants “would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense of a federally mandated regulatory program.”¹¹⁷ In other words, the states can simply choose to step aside and do nothing at all.

The *Health Care Cases* disrupt this understanding. If the states have no “genuine choice” but to govern on the subject of X—for whatever set of practical reasons—then they lack any “real option” of stepping aside and doing nothing. Instead, the federal statute is

¹¹⁶ *New York v. United States*, 505 U.S. 144, 167 (1992).

¹¹⁷ *Id.* at 168.

effectively *requiring* the states to act, and to act according to federal instructions A, B, and C. The federal law “dragoons” the states into governing according to Congress’s directives.

To be sure, the vast majority of federal statutes conditionally preempting state law are almost certainly still constitutional, even after the *Health Care Cases*, because they leave the states a legitimate choice not to govern on Congress’s terms. To pick just one example (from hundreds), consider the Federal Boat Safety Act of 1971, which directs states to “not establish, continue in effect, or enforce a law or regulation establishing a recreational vessel or associated equipment performance or other safety standard or imposing a requirement for associated equipment . . . that is not identical to a regulation prescribed” by the Coast Guard.¹¹⁸ Whatever “genuine choice” might mean, exactly, state governments surely have the practical capacity not to regulate on the subjects of power boat safety already covered by a Coast Guard regulation. No state could plausibly claim that the Federal Boat Safety Act effectively *compels* it to enact regulations identical to those prescribed by the federal government.

But many cases will not be so easy. Consider the following, somewhat fanciful hypothetical. Suppose that Congress generally would like the possession, sale, and distribution of illicit narcotics (such as cocaine, methamphetamine, and marijuana) to be criminally prohibited. But Congress has also concluded that, due to mounting budget pressures, the cost of investigating, prosecuting, and incarcerating persons committing these crimes is simply too expensive for the federal government to bear. Thus, Congress replaces the existing federal Controlled Substances Act¹¹⁹ with a statute offering the states the following choice: (1) they can enact and enforce a state-level Controlled Substances Act (the provisions of which mirror the current federal law), or (2) they can step aside and do nothing, in which case federal law will completely preempt the field. Because of federal budget constraints, though, the federal preemption of a given state’s law will essentially mean that drug trafficking and possession will go unpunished within that state’s borders.

¹¹⁸ 46 U.S.C. §4306 (2012).

¹¹⁹ See 21 U.S.C. §841 (2012).

The statute formally offers the states a choice. But as a practical matter, state governments may find it impossible to endure an unregulated market in illicit narcotics, especially if that conduct is tightly regulated in the states surrounding them (making their jurisdictions a magnet for the drug market). Thus, the choice the federal law offers the states may not be *genuine*; state governments may have no “real option” but to accede to Congress’s conditions and implement the prescribed federal regulatory program. If so, the *Health Care Cases* dictate that this hypothetical federal statute has commanded the states to act affirmatively in regulating under Congress’s direction, and is thus an unconstitutional commandeering.

We can imagine other examples, but the broader point is this: The *Health Care Cases* have qualitatively changed the meaning of the anti-commandeering principle. Because the inquiry as to whether a federal law amounts to compulsion is now practical in nature, statutes formally offering the states a choice may nonetheless be treated as issuing the states commands. And if those commands require the states affirmatively to govern in a particular fashion—whether framed as conditions attached to federal funds, or as conditions precedent to avoiding federal preemption—they amount to impermissible commandeering.

IV. A CASE STUDY: THE FEDERAL REGULATION OF STATE TAXATION

Presently, it is unclear how much this new understanding of the anti-commandeering doctrine will actually constrain Congress’s legislative authority. Much depends on how the Supreme Court ultimately defines the concept of “genuine choice” (or “real option”), a matter the *Health Care Cases* left quite opaque.¹²⁰ As the Chief Justice wrote, “[w]e have no need to fix a line” that defines “where

¹²⁰ See Friedman, *supra* note 5 (after the *Health Care Cases*, “the line between inducing state participation, which is legal, and coercing it, which is not, remains hard to identify with precision”); Huberfield, *supra* note 111 (“The Court refused to define coercion beyond assessing the Medicaid expansion as being ‘beyond the line’ where ‘persuasion becomes coercion.’”).

persuasion gives way to coercion. . . . It is enough for today that wherever that line may be, this statute is surely beyond it.”¹²¹

What makes a state’s option “real” might turn on whether the financial consequences are simply too large for a state realistically to reject Congress’s conditions. (This was largely the problem with the ACA’s Medicaid provisions.¹²²) Or it might depend on whether the states have already invested substantially in the administration and implementation of the affected program—whether they “have developed intricate statutory and administrative regimes over the course of many decades to implement their objectives.”¹²³ (This, too, was a problem with the ACA cited in the *Health Care Cases*.¹²⁴) Or it could hinge, at least to some degree, on whether the subject at issue is central to a state’s existence as an independent sovereign, a factor the Court has considered in resolving other questions of constitutional federalism.¹²⁵

In all events, there is at least one important area where the new meaning of commandeering would seem unquestionably to apply—where the financial consequences to the states are potentially enormous, where the states have developed intricate statutory and administrative regimes over the course of many decades, and where

¹²¹ *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2606 (2012).

¹²² *Id.* at 2605 (“The threatened loss of over 10 percent of a State’s overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”).

¹²³ *Id.* at 2604.

¹²⁴ *Id.*

¹²⁵ *See* *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding that Congress lacked the authority to regulate the conduct of state governments “in areas of traditional governmental functions”); *United States v. Morrison*, 529 U.S. 598, 617 (2000) (holding that the civil remedy provision of the Violence Against Women Act exceeded Congress’s commerce power in part because “[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States”); *United States v. Lopez*, 514 U.S. 549, 564 (1995) (invalidating the Gun-Free School Zones Act in part because it intruded on “areas such as criminal law enforcement or education where States historically have been sovereign”).

the subject matter is core to the states' sovereignty. And that is the field of state and local taxation.

A. *State and local taxation in the United States*

At this point, a brief primer on state and local taxes is in order. State and local governments impose a wide variety of taxes, all of which have some impact on interstate commerce. As of 2008 (the latest year for which the relevant data are available), the most significant subnational taxes were those imposed on sales and gross receipts (\$449 billion), property (\$410 billion), personal income (\$305 billion), and corporate income (\$58 billion).¹²⁶ All told, state and local governments collected more than \$1.3 trillion in tax revenue in 2008, accounting for more than one third of the tax burden in the United States.¹²⁷

Given our federal structure, states have an inherent incentive to minimize the tax burden borne by their own residents while, at the same time, maximizing their collection of revenue. Thus, states are constantly devising tax schemes that, in one way or another, burden or discriminate against interstate commerce.¹²⁸ Historically, our constitutional system's principal means for policing this parochial behavior has been through the judiciary's enforcement of the dormant Commerce Clause. Going back to its 1852 decision in *Cooley v. Board of Wardens*,¹²⁹ the Supreme Court has invoked the Commerce Clause to invalidate state or local laws that interfered with the creation of a common national market, free from state or local trade barriers.¹³⁰ And the Court has used the dormant Commerce Clause specifically to invalidate state or local tax measures since at least 1872.¹³¹

¹²⁶ STATISTICAL ABSTRACT OF THE UNITED STATES 2012, Table 435, available at <http://www.census.gov/compendia/statab/2012/tables/12s0435.pdf>.

¹²⁷ *Id.*

¹²⁸ See Shaviro, *supra* note 20.

¹²⁹ 53 U.S. (12 How.) 299, 318 (1852).

¹³⁰ See 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §6-2, at 1030 (3d ed. 2000); HELLERSTEIN & HELLERSTEIN, *supra* note 21, at 194.

¹³¹ See *Case of the State Freight Tax*, 82 U.S. (15 Wall.) 232 (1872). See also HELLERSTEIN & HELLERSTEIN, *supra* note 21, at 195 (“*The Case of the State*

The Court's application of the dormant Commerce Clause to state and local taxes has hardly followed a steady path. As the justices observed a half-century ago, despite having by then "handed down some three-hundred full-dress opinions" on the subject, their decisions "have been 'not always clear . . . consistent or reconcilable.'"¹³² Still, the basic thrust has always been to protect interstate commerce from taxes that operate to protect or advantage in-state economic interests.¹³³ Presently, the Court applies a four-part test¹³⁴ first fully articulated in *Complete Auto Transit, Inc. v. Brady*.¹³⁵ Under *Complete Auto*, a state or local tax imposed on interstate commerce "will not survive Commerce Clause scrutiny if the taxpayer demonstrates that the tax (1) applies to an activity lacking a substantial nexus to the taxing State; (2) is not fairly apportioned; (3)

Freight Tax . . . first unequivocally announced and squarely applied the doctrine that the Commerce Clause by its own force limits state tax power over interstate commerce.").

¹³² *Northwestern States Portland Cement Co. v. Minnesota* 358 U.S. 450, 457–58 (1959) (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344 (1957)).

¹³³ See Generally Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

¹³⁴ See, e.g., *Oklahoma Tax Com'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 183 (1995); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 310–11 (1994); *Intl Containers Intern'l Corp. v. Huddleston*, 507 U.S. 60, 73 (1993); *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992); *Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 372 (1991); *Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dep't of Treasury*, 490 U.S. 66, 72 (1989); *Goldberg v. Sweet*, 488 U.S. 252, 258–60 (1989); *D.H. Holmes Co.Ltd. v. McNamara*, 486 U.S. 24, 30 (1988); *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266, 291 (1987); *Wardair Can. Inc. v. Florida Dep't of Revenue*, 477 U.S. 1, 8 (1986); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981); *Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980); *Department of Revenue v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 745 (1978); see also Walter Hellerstein, Michael J. McIntyre & Richard D. Pomp, *Commerce Clause Restraints on State Taxation After Jefferson Lines*, 51 TAX L. REV. 47, 49 & n.13 (1995).

¹³⁵ 430 U.S. 274 (1977).

discriminates against interstate commerce; or (4) is not fairly related to the services provided by the State.”¹³⁶ The Court has used these criteria to invalidate scores of state or local taxes.

Importantly, though, the federal judiciary is not the only national institution involved in protecting interstate commerce from overweening state and local taxation. At least since the 1950s, Congress has also played a role, enacting a number of statutes regulating how state and local governments impose specific levies. For example, Public Law 86–272 provides that “[n]o State, or political subdivision thereof, shall have power to impose . . . a net income tax on the income derived within such State” when the taxpayer limits its activities in that state to “the solicitation of orders . . . for tangible personal property.”¹³⁷ The Railroad Revitalization and Regulatory Reform Act forbids states from imposing any tax “that discriminates against a rail carrier,”¹³⁸ and subsequent amendments forbid similar discrimination against motor carriers¹³⁹ or air carriers.¹⁴⁰ The Internet Tax Freedom Act states that “[n]o State or political subdivision thereof shall impose any . . . [t]axes on Internet access” or “[m]ultiple or discriminatory taxes on electronic commerce.”¹⁴¹ And the State Taxation of Pension Income Act of 1995 provides that “[n]o State may impose an income tax on any retirement income of an individual who is not a resident or domiciliary of such State (as determined under the laws of such State).”¹⁴²

The Supreme Court has long held that the Commerce Clause grants Congress the authority to enact these sorts of statutes—statutes regulating how states and their political subdivisions tax persons or entities engaged in interstate commerce. Consider the Court’s 1978 decision in *Moorman Manufacturing v. Bair*.¹⁴³ At issue

¹³⁶ *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 310–11 (1994) (emphasis added).

¹³⁷ Act of Sept. 14, 1959, Pub. L. No. 86–272, 73 Stat. 555.

¹³⁸ 49 U.S.C. §11501(b)(4).

¹³⁹ 49 U.S.C. §14502.

¹⁴⁰ 49 U.S.C. §40116.

¹⁴¹ 47 U.S.C. §151 note.

¹⁴² 4 U.S.C. §114.

¹⁴³ 437 U.S. 267 (1978).

was Iowa's method of apportioning the income of multistate businesses for purposes of the state's corporate income tax. Unlike other states, Iowa computed a taxpayer's income attributable to Iowa based entirely on the proportion of the taxpayer's sales to Iowa customers.¹⁴⁴ Given other states' use of multi-factor apportionment formulas, the practical effect of Iowa's scheme was to subject many out-of-state corporations to state-level taxation on more than 100 percent of their income.¹⁴⁵ It also created a financial incentive for out-of-state businesses to locate their property and jobs in Iowa.¹⁴⁶

Nonetheless, the Court rejected the taxpayers' challenge to Iowa's scheme. The justices did not really deny that Iowa's single-factor sales apportionment scheme effectively produced multiple taxation, or that this multiple taxation potentially discriminated against interstate commerce. Rather, the Court explained that, whatever the substantive merits of the out-of-state businesses' complaint, *Congress* was the institution to solve the problem: "It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions."¹⁴⁷

Or consider the Court's 1992 decision in *Quill Corp. v. North Dakota*.¹⁴⁸ The question there was whether North Dakota could require out-of-state sellers lacking any "physical presence" in the state to collect use taxes on sales to North Dakota customers.¹⁴⁹ Critically, the Court had held twenty-five years earlier, in *National Bellas Hess, Inc. v. Department of Revenue*,¹⁵⁰ that the imposition of a collection obligation under these circumstances was unconstitutional.¹⁵¹ In *Quill*, the Court overruled *Bellas Hess* to the extent it had relied on

¹⁴⁴ *Id.* at 269–70.

¹⁴⁵ *Id.* at 285–86 & n.2 (Powell, J., dissenting).

¹⁴⁶ *Id.* at 289 (Powell, J., dissenting).

¹⁴⁷ *Id.* at 280 (emphasis added).

¹⁴⁸ 504 U.S. 298 (1992).

¹⁴⁹ *Id.* at 301.

¹⁵⁰ 386 U.S. 753 (1967).

¹⁵¹ *Id.* at 758.

principles of due process, but it retained *Bellas Hess*'s physical presence requirement under the dormant Commerce Clause.¹⁵² As in *Moorman*, the Court explained that Congress was the appropriate institution to balance the relevant considerations: "[T]he underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions."¹⁵³

There are several other examples, but the basic point is clear. As the leading treatise in the field sums up, "Congress possesses unquestioned power under the Commerce Clause to regulate state taxation of interstate commerce."¹⁵⁴

B. Applying the new understanding

The Supreme Court has never explicitly discussed how federal statutes that regulate state and local taxation are compatible with the anti-commandeering principle. But synthesizing these two doctrines is relatively straightforward—or at least it was before the *Health Care Cases*.

Again, none of these federal statutes, in express terms, *requires* a state or local government to impose a given tax. Instead, these laws all take the form of conditional prohibitions. Consider the Mobile Telecommunications Sourcing Act (or MTSA).¹⁵⁵ It provides (in relevant part) that, "[n]otwithstanding the law of any State or political subdivision of any State, mobile telecommunications services provided in a taxing jurisdiction to a customer, the charges for which are billed by or for the customer's home service provider, shall be deemed to be

¹⁵² *Quill*, 504 U.S. at 306–20.

¹⁵³ *Id.* at 318 (emphasis added).

¹⁵⁴ HELLERSTEIN, *supra* note 19, at ¶ 4.24. *See also* Arthur R. Rosen & Jeffrey S. Reed, *The Final Word: Congress and the Express Commerce Clause*, 2007 ST. & LOCAL TAX LAW. 9, 22 ("A strong line of cases clearly demonstrates that Congress has the power to regulate state taxation."); Shaviro, *supra* note 20, at 986.

¹⁵⁵ Pub. L. No. 106–352, 114 Stat. 1370.

provided by the customer’s home service provider.”¹⁵⁶ The MTSA does not *force* the states to tax mobile communications. But if they choose to do so, they must implement the specific sourcing rules prescribed by Congress.

Conceptualized this way, federal statutes regulating state and local taxation are no more than a garden-variety species of preemption. They effectively nullify—or preempt—state or local taxes failing to conform to a particular federal norm. As with federal laws preempting other forms of state regulation, federal statutes regulating state and local taxation always afford state and local governments the option to step aside and do nothing at all. A state that does not like the MTSA’s sourcing rules, for instance, can simply decide not to tax mobile telecommunication services. In this way, Congress has not *commanded* the states to take any affirmative acts, and the federal statutes cannot be understood as commandeering.

As should now be clear, the *Health Care Cases* upend this understanding. To repeat, the *ratio decidendi* of the Court’s Medicaid holding is that any federal law regulating the conduct of the states that does not offer the states a genuine, practical choice but to comply with Congress’s conditions must be understood as a federal command. This means that, if Congress regulates a state tax that the state practically has “no option” but to impose—and thus is forced to implement on Congress’s terms—the federal law necessarily constitutes a commandeering.

Consider, for example, a federal statute regulating the states’ division of income for purposes of business activity taxes (such as corporate income taxes), precisely the type of law contemplated by the Court in *Moorman*. Such a statute would generally consist of the following: (1) a prescription of uniform rules for the apportionment of business income (*i.e.*, income earned in the ordinary operation of the enterprise); (2) definitions of the factors—such as sales, property, and payroll—that form the prescribed formula; and (3) a set of rules for allocating businesses’ non-business income (*i.e.*, non-operational, investment income). Now assume, reasonably enough, that several states depend heavily on their business activity tax revenue—perhaps

¹⁵⁶ 4 U.S.C. §117(a) (2012).

that this revenue (much like federal Medicaid reimbursements) constitutes close to 10 percent of their annual budgets. The logic of the *Health Care Cases* dictates that the states may have no “genuine choice” but to continue imposing their business activity taxes. As a result, Congress’s prescriptions as to how states are to apportion business income, define the relevant apportionment factors, and allocate non-business income would all constitute federal commands—commands forcing states to act affirmatively in their sovereign capacities. As such, the precise sort of federal law endorsed by the Court in *Moorman* would constitute a commandeering.

Or suppose Congress enacted a statute similar to that contemplated by the Streamlined Sales and Use Tax Agreement (SSUTA),¹⁵⁷ a plan collectively developed over the past decade by state tax administrators and other stakeholders. Such a law would require states imposing sales and use taxes to implement and enforce a variety of provisions, such as (1) greater uniformity in the applicable tax rate,¹⁵⁸ (2) state-level uniformity in the tax base,¹⁵⁹ (3) uniform rules for determining where covered transactions occur,¹⁶⁰ and (4) uniform definitions of items commonly exempted from sales taxes (such as groceries and medical supplies).¹⁶¹ Again, many states that currently impose sales and use taxes might well find it practically impossible to forego the revenue those taxes generate. As a result, a federal law requiring the states to conform their sales tax schemes to the basic provisions of the SSUTA would, under the rationale of the *Health Care Cases*, amount to a command. And because that command would force the states affirmatively to govern according to Congress’s instructions, it would amount to a commandeering.

These are just two possibilities. The larger point is that, whenever a state depends significantly on the revenue a given tax generates, a federal law prescribing the terms on which that tax can be

¹⁵⁷ See Streamlined Sales and Use Tax Agreement, available at <http://www.streamlinedsalestax.org/uploads/downloads/Archive/SSUTA/SSUTA%20As%20Amended%2005-19-11.pdf>.

¹⁵⁸ *Id.* §308.

¹⁵⁹ *Id.* §302.

¹⁶⁰ *Id.* §§309–315.

¹⁶¹ *Id.* §316.

implemented is now constitutionally suspect. One might try to argue that *taxing* is not really *governing*, such that federal laws dictating how states are to implement their tax schemes simply fall outside the ambit of the anti-commandeering principle. But that seems implausible. If implementing a spending program that provides health insurance to the indigent counts as “governance”—as the Court concluded in the *Health Care Cases*—so must the imposition of taxes. Indeed, how a state decides to tax its residents would seem to fall closer to the core of its sovereignty than how it distributes a benefit like health coverage.

C. Some practical consequences

The example of federal statutes that regulate state and local taxation serves not just to illustrate how the *Health Care Cases* have altered the contours of the anti-commandeering principle. It also reveals an unfortunate (and likely unintended) consequence of the Court’s decision: It may seriously fetter Congress’s authority to address the many problems plaguing the Nation’s state and local tax system. And as the Court itself has often acknowledged, Congress is much better situated than the judiciary to devise solutions to these complex problems.

Complications of measurement make it impossible to know for certain, but it is likely that state and local tax schemes impose billions of dollars in needless costs on the United States economy. Consider the following four pathologies, all of which are largely endemic to our federal structure.

1. *Disadvantaging interstate commerce.* — State governments have an inherent political incentive to design their tax systems to provide competitive advantages to in-state taxpayers and to maximize the economic incidence of their taxes on out-of-state taxpayers. Of course, the judicial enforcement of the dormant Commerce Clause can stymie blatant forms of such discrimination. But subtler practices—the single-factor apportionment of business income at issue in *Moorman*, for example, or the common game of imposing higher sales tax rates on hotels and rental cars—routinely disadvantage commerce that crosses state lines. This tax favoritism is obviously inefficient; it

reduces the aggregate social gains from trade by favoring higher-cost, local businesses at the expense of more efficient, out-of-state firms.

2. *Locational distortions.* — Relatedly, state tax schemes (again, like the single-factor apportionment formula at issue in *Moorman*) tend to distort taxpayers' locational decisions, inducing states to locate their facilities and jobs in particular jurisdictions. This, too, results in deadweight loss, as it induces behavior not because of its underlying economic sense but purely due to its tax consequences. Of course, many of these locational distortions are unavoidable, given that states have broad discretion to pursue differing tax policies. But federal legislation can constrain that discretion in constructive ways, and thereby reduce the size of these distortions.

3. *Undertaxation and the underproduction of public goods.* — Presently, state and local governments have a strong incentive to compete with one another for mobile taxpayers—specifically, business enterprises and affluent individuals. Under the right conditions, this competition can be healthy for the economy. But because the states are generally incapable of coordinating their tax policies, they cannot bind each other to any ground rules to govern their tax competition. This collective action problem creates a sort of prisoner's dilemma, in which the states are apt to tax mobile taxpayers more lightly than they sincerely prefer.¹⁶² The likely result is that the states collect a less-than-optimal amount of revenue, and consequently produce a suboptimal level of public goods (such as education, health care, and police protection). This, too, is a loss to aggregate social welfare.

4. *Planning and compliance costs.* — Finally, non-uniform state and local taxes—the varying schemes, rules, and definitions splayed out across more than 7,500 distinct taxing jurisdictions¹⁶³—forces taxpayers to devote substantial resources to tax planning and compliance.¹⁶⁴ The present level of non-uniformity requires taxpayers to maintain a working knowledge of hundreds of different tax regimes;

¹⁶² See William F. Fox & John A. Swain, *The Federal Role in State Taxation: A Normative Approach*, 60 NAT'L TAX J. 611, 615 (2007).

¹⁶³ See *Sales Tax Fairness and Simplification Act: Hearing Before the Subcomm. On Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. 11 (2007) (statement of Rep. Lofgren).

¹⁶⁴ See Shaviro, *supra* note 20, at 919–27.

engage in multiple, overlapping calculations of their liabilities; maintain separate sets of records (given the varying definitions of salient tax attributes, such as basis); and file hundreds (if not thousands) of different forms.¹⁶⁵ It also encourages taxpayers to engage the assistance of lawyers, accountants, and consultants to devise sophisticated tax minimization strategies. To be sure, every tax system entails planning and compliance costs. But the number and heterogeneity of taxing jurisdictions in the United States increases those costs exponentially.

* * *

In short, the negative wealth effects attributable to the state and local tax system—caused by the states’ strategic behavior, state-level collective action problems, and the non-uniformity of state and local tax regimes—are likely substantial. It is therefore unsurprising that Congress has considered several measures to regulate state and local taxes in recent years. Proposed legislation includes the Business Activity Tax Simplification Act, which would clarify when states have jurisdiction to impose income taxes on out-of-state firms¹⁶⁶; the Mobile Workforce State Income Tax Fairness and Simplification Act, which would specify rules governing state jurisdiction to tax the income of individuals performing services in more than one state¹⁶⁷; the Telecommuter Tax Fairness Act, which would define the circumstances under which a state could tax the income of an individual whose professional office address is located in the taxing state, but who performs her work at home in another state¹⁶⁸; and the Sales Tax Fairness and Simplification Act, which would grant Congress’s consent to the terms of the SSUTA.¹⁶⁹

The logic of the *Health Care Cases*, however, means that some of these proposals may well be unconstitutional. Indeed, by expanding the breadth of the anti-commandeering principle, the Court may have

¹⁶⁵ See Shaviro, *supra* note 20, at 919–27.

¹⁶⁶ H.R. 1083, 111th Cong. (2009).

¹⁶⁷ H.R. 2110, 111th Cong. (2009).

¹⁶⁸ H.R. 2600, 111th Cong. (2009).

¹⁶⁹ H.R. 3396, 110th Cong. (2007).

disempowered Congress from enacting *any* legislation prescribing the terms on which states can implement taxes on which they currently depend. This could be quite unfortunate, for as the justices have frequently acknowledged, Congress is much better suited than the courts to address these complicated problems of tax policy.¹⁷⁰ As Justice Black cogently observed more than sixty years ago in *McCarroll v. Dixie Greyhound Lines*,¹⁷¹ “Congress alone can, in the exercise of its plenary constitutional control over interstate commerce, not only consider whether such a tax as now under scrutiny is consistent with the best interests of our national economy, but can also on the basis of full exploration of the many aspects of a complicated problem devise a national policy fair alike to the State and our Union.”¹⁷²

To be sure, Congress’s solutions will not be perfect. But as a matter of comparative institutional competence, Congress is much better positioned than the judiciary to devise detailed, prospective rules that are tailored to the intricacies of state and local taxation.

CONCLUSION

The Supreme Court’s decision in the *Health Care Cases* was hugely important—for health policy, for constitutional law, and for the Supreme Court. Its consequences are likely to reverberate for years. One of those consequences is that the Court effectively re-conceptualized what constitutes a federal command to the states. Regardless of the legislative authority Congress has invoked, a federal law leaving the states no “genuine choice” but to accede to Congress’s conditions must be understood as a command. And if that command

¹⁷⁰ Indeed, unless Congress repeals the Tax Injunction Act, 28 U.S.C. §1341, which precludes lower federal court jurisdiction over most state tax disputes, the Supreme Court could be the *only* national institution capable of engaging in this endeavor.

¹⁷¹ 309 U.S. 176 (1940).

¹⁷² *Id.* at 188–89 (Black, J., dissenting). *See also* *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (White, J., concurring); *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 476 (1959) (Frankfurter, J., dissenting).

requires the states to act affirmatively in their sovereign capacities, it amounts to an unconstitutional commandeering.

It is unclear how many federal laws might be jeopardized by the Court's decision. The answer largely depends on the sorts of practical circumstances leading the Court to conclude that the states lack a "legitimate choice" or "real option." But one place this new understanding plainly matters is in assessing the constitutionality of federal laws that regulate state and local taxation. If a state relies heavily on a particular tax, the *Health Care Cases* suggest that a federal statute prescribing the manner in which that tax is to be imposed constitutes a command, and thus a commandeering.

There is some irony here. Several commentators have criticized the Court's decision for unjustifiably expanding the government's authority to tax, pointing to the opinion's broad construction of Congress's taxing power in sustaining the ACA's minimum coverage provision.¹⁷³ These critics may be right, but perhaps not for the

¹⁷³ See, e.g., Robert Alt, *Twisting a statute is better than twisting the Constitution*, SCOTUSBLOG (Jun. 28, 2012, 6:27 PM), <http://www.scotusblog.com/2012/06/twisting-a-statute-is-better-than-twisting-the-constitution/>; Richard A. Epstein, *Taxation and regulation under the health care act*, SCOTUSBLOG (Jun. 28, 2012, 12:05 PM), <http://www.scotusblog.com/2012/06/taxation-and-regulation-under-the-health-care-act/>; Rick Hills, *The Healthcare Decision and the Revival of the Taxing Power: The Costs and Benefits of Formalism in Federalism*, PRAWFSBLAWG, June 28, 2012, available at <http://prawfsblawg.blogs.com/prawfsblawg/2012/06/the-healthcare-decision-and-the-costs-and-benefits-of-formalism-in-federalism.html#more>; Clark Neily, *Unintended consequences*, SCOTUSBLOG (Jun. 29, 2012, 9:54 AM), <http://www.scotusblog.com/2012/06/unintended-consequences/>; Ilya Somin, *A taxing, but potentially hopeful decision*, SCOTUSBLOG (Jun. 28, 2012, 6:13 PM), <http://www.scotusblog.com/2012/06/a-taxing-but-potentially-hopeful-decision/>; Ilya Somin, *An Unpersuasive Majority Ruling on Obamacare*, N.Y. DAILY NEWS, June 28, 2012, available at <http://www.nydailynews.com/opinion/unpersuasive-majority-ruling-obamacare-article-1.1104052>; John Yoo, *Chief Justice Roberts and His Apologists*, WALL STREET J., June 29, 2012, available at http://online.wsj.com/article/SB10001424052702303561504577496520011395292.html?mod=WSJ_Opinion_LEADTop.

reason they have identified. The more acute tax problem created by the Court's holding may instead lie in its new understanding of commandeering.